

S. Riback



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nomura Enterprise, Inc.

File: B-236217

Date: November 7, 1989

DIGEST

1. Protest that firm was improperly excluded from further consideration in architect-engineer acquisition is denied where record shows that preselection committee had reasonable basis for recommending firms which it ultimately recommended to the source selection board and judgment of preselection committee was consistent with stated evaluation criteria.
2. Protest that agency made an improper de facto determination of nonresponsibility is denied where record shows that firm's disqualification resulted from technical finding that firm was less qualified and experienced than other firms based on the stated evaluation criteria. Fact that certain evaluation criteria encompassed traditional elements of responsibility does not serve to convert technical finding to finding of nonresponsibility.
3. Allegation that procurement should have been set aside for small business is dismissed as untimely where not filed prior to date set for submission of architect-engineer qualifications statements.

DECISION

Nomura Enterprise, Inc. (NEI) protests the rejection of its qualifications statement under solicitation No. N62467-89-R-0522 issued by the Naval Facilities Engineering Command (NAVFAC) for the acquisition of value engineering studies and training. NEI argues that the Navy improperly evaluated its submission, that the Navy made an improper de facto nonresponsibility determination in rejecting the firm and that the solicitation was improperly issued on an unrestricted basis and should have been set aside for small businesses.

We deny the protest in part and dismiss it in part.

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This procurement action is for the acquisition of architect-engineer (A-E) services and, consequently, is being conducted pursuant to the procedures outlined in the Brooks Act, 40 U.S.C. § 541 et seq. (1982), as amended by Pub. L. No. 100-656, § 742, 102 Stat. 3853 (1988) and Pub. L. 100-679, § 8, 102 Stat. 4055 (1988), and its implementing regulations, Federal Acquisition Regulation (FAR) part 36.6 (FAC 84-45). In accordance with the regulations, the Navy, on May 26, 1989, published a notice in the Commerce Business Daily (CBD) identifying the requirement and inviting firms to submit standard form (SF) 254 and SF 255 on which firms provide their qualifications. The CBD notice also stated that firms submitting their qualifications would be evaluated under six criteria, listed in order of their relative importance. The six evaluation criteria were, in order, as follows:

- (1) qualifications of the people assigned to do the work including professional registration and previous design experience;
- (2) recent experience of these people in conducting value engineering studies and value engineering training;
- (3) awards from all DOD agencies with the past 12 months with the objective of trying to distribute contracts among all qualified firms including those that are minority owned or have not had prior contracts;
- (4) ability to do several projects concurrently;
- (5) professional capacity to accomplish the work starting Nov 89 and completing Nov 91; and
- (6) past performance on DOD contracts.

The CBD notice also provided that the procurement was not set aside for small businesses.

By the closing date provided in the CBD notice, the Navy had received a total of 17 responses, including the protester's submission. The Navy convened a preselection or "slate committee" pursuant to NAVFAC procedures for purposes of selecting a "slate" of firms for recommendation to the selection board. After reviewing the submissions of all 17 firms who had responded to the CBD notice, the slate committee selected six firms for recommendation to the selection board, all of whom were considered to be the most highly qualified under the published evaluation criteria. NEI was not among the firms recommended for consideration by the selection board, and this protest followed.

NEI first argues that the Navy's actions in excluding it from consideration by the slate committee were arbitrary and

capricious. Specifically, NEI alleges that the Navy, rather than evaluate NEI consistent with the stated evaluation criteria, chose instead to evaluate it comparatively vis-a-vis the other firms in the competition. NEI asserts that it met the agency's "minimum requirements" and, thus, should have been recommended to the selection board.

The Navy responds that, contrary to NEI's allegations, it did in fact carefully consider the firm based on the stated evaluation criteria. The Navy states, simply, that there were other firms that, when compared to the same criteria, were found to be superior to the protester. The Navy reports that the selected firms had better qualifications than the protester and also had more recent relevant NAVFAC experience. For example, the Navy notes that NEI had only one "certified value specialist" on staff, whereas the firms selected had two or more certified value specialists on staff.

Our review of the agency selection of an A-E contractor is limited to examining whether that selection is reasonable. We will question the agency's judgment only if it is shown to be arbitrary. Engineering Sciences, Inc., B-226871, July 29, 1987, 87-2 CPD ¶ 109; Arix Corp., B-195503, Nov. 6, 1979, 79-2 CPD ¶ 331. Further, it is not the function of our Office to make our own determination of the relative merits of the submissions of A-E firms. The procuring officials enjoy a reasonable degree of discretion in evaluating such submissions and we will not substitute our judgment for that of the procuring agency by conducting an independent examination. Y.T. Huang & Assocs., Inc., B-217122; B-217126, Feb. 21, 1985, 85-1 CPD ¶ 220.

Here, we are satisfied, based upon our review of the record, that the Navy did not act unreasonably in excluding NEI. The preselection committee specifically found that the firms which it recommended had better qualifications and more recent and extensive NAVFAC and Department of Defense experience than those firms not recommended.^{1/} The committee also found that the recommended firms all had assigned individuals to do the work who had extensive value engineering experience, the primary work to be performed under this solicitation. In addition, the preselection committee found that the recommended firms had design experience which was particularly relevant to the contract requirement in question. Also, consistent with the

^{1/} Contrary to NEI's allegation, the record shows that each firm was independently considered in light of the evaluation criteria by each member of the preselection committee.

evaluation criteria, the agency considered, in selecting its slate of six firms for negotiation, that these firms had a better ability to perform several projects concurrently in the near future. Finally, the Navy's decision considered the agency's overall distribution of contracts to qualified firms. While NEI disagrees with the Navy's evaluation and preselection decision, it has failed to establish that the Navy's determinations were unreasonable or inconsistent with the stated evaluation criteria.

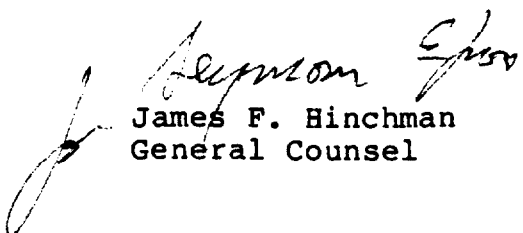
NEI next contends that the Navy's exclusion of it from further consideration constituted a de facto determination of nonresponsibility which should have been referred to the Small Business Administration for consideration under the certificate of competency (COC) program. In this regard, NEI alleges that it was found less qualified and experienced in general responsibility areas such as experience outlined in FAR § 9.104-1 (FAC 84-13) and was therefore found to be nonresponsible.

We disagree with the protester that the Navy's exclusion of NEI was a de facto nonresponsibility determination. The record shows that the Navy found NEI less qualified in those areas listed in the evaluation criteria relating to previous experience, design experience and personnel qualifications. However, it is not improper, within the context of a negotiated procurement, to include traditional responsibility factors among the technical evaluation factors, Pacific Computer Corp., B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292, and such factors may include experience and personnel qualifications. B & W Service Indus., Inc., B-224392.2, Oct. 2, 1986, 86-2 CPD ¶ 384. So long as the factors are limited to areas which, when evaluated comparatively, can provide an appropriate basis for a selection which will be in the government's best interest, COC review procedures do not apply to such technical deficiencies. Arrowsmith Indus., Inc., B-233212, Feb. 8, 1989, 89-1 CPD ¶ 129. We therefore deny this basis of NEI's protest.

Finally, NEI alleges that this procurement should have been set aside for small businesses. We dismiss this contention as untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989), require that protests against alleged deficiencies in a solicitation, be filed before responses to the solicitation are due. The synopsis clearly stated this procurement was not a set-aside. If NEI believed that this procurement should have been set aside for small businesses it should have filed its protest prior to the time and date

set for the submission of qualifications statements. Encon Management, Inc., B-233044, Dec. 9, 1988, 88-2 CPD ¶ 579.

We dismiss the protest in part and deny it in part.



James F. Hinchman
General Counsel